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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT AS TO JURISDICTION.

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Counsel for Appellant.

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Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

STATEMENT BY APPELLANT TO COMPLY WITH RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

This is a suit filed in the Chancery Court of Davidson County, Tennessee, by International Steel and Iron Company against National Construction Company, National Surety Company, R. H. Baker, Commissioner of Highways and Public Works of the State of Tennessee, and Equitable Casualty and Surety Company, in which appel-

lant sought a judgment against all of the defendants (except R. H. Baker, Commissioner, whom the statutes required to be made a defendant) for labor and materials furnished by appellant to National Construction Company and used in the construction of a certain bridge across the Tennessee River, which bridge was constructed under contract dated March 12, 1928, between National Construction Company and the State of Tennessee, on which contract National Surety Company became surety in accordance with the requirements of the statutes of the State of Tennessee. Appellant furnished the labor and materials under a special contract with National Construction Company, dated March 22, 1928, and upon the completion of the bridge National Construction Company was indebted to appellant in the sum of Fifty-Nine Thousand, Eight Hundred Thirty-Three and 71/100 ($59,833.71) Dollars. The Comissioner of Highways and Public Works had retained as required by statute ten per cent of the funds due from the State to National Construction Company, which amount was ample to satisfy appellant's claim, and after appellant had filed and perfected its claim against National Construction Company and its surety, National Surety Company, all of the funds held by the Highway Commissioner were paid over to National Construction Company without appellant's knowledge or consent, pursuant to Chapter 80 of the 1929 Public Acts of Tennessee, which was adopted by the General Assembly of Tennessee on April 10, 1929, more than a year after the making of the contract between appellant and National Construction Company. In paying over said retained funds the Highway Commissioner took a refunding bond as provided in said Chapter 80 of the 1929 Public Acts of Tennessee, which refunding bond was executed by National Construction Company and Equitable Casualty and Surety Company, as surety.

In the Chancery Court of Davidson County, Tennessee,

appellant sought a recovery for the amount of its indebtedness against National Construction Company, the contractor; National Surety Company, surety on its contract, and Equitable Casualty Surety Company, as surety on the refunding bond. During the course of the litigation, Equitable Casualty and Surety Company became insolvent and Consolidated Indemnity and Insurance Company was substituted in its place and stead by consent, without prejudice, to the extent of Forty Thousand ($40,000.00) Dollars. A judgment was rendered in said Chancery Court in favor of appellant for the full amount of its indebtedness against National Construction Company and its surety, National Surety Company, and against Consolidated Indemnity and Insurance Company, to the extent of Forty Thousand ($40,000.00) Dollars. None of the defendants appealed except National Surety Company, which appealed to the Middle Division of the Tennessee Court of Appeals at Nashville.

On said appeal National Surety Company insisted that, under the provisions of said Chapter 80 of the 1929 Public Acts of Tennessee, it was released from the obligation of its contract as surety for National Construction Company by the payment of the retained funds by the Highway Commissioner to the general contractor, it being insisted that said act was applicable to the pre-existing contract of appellant and that its intent and effect was to release and relieve said National Surety Company as general contract surety from any and all further liability on claims for labor and materials against the principal contractor. This insistence was disallowed by the Court of Appeals, which held that said Chapter 80 of the 1929 Public Acts of Tennessee was not retroactive and was not applicable to the contract involved in this cause. Said court, however, further held that said National Surety Company was released from all liability as a matter of law by reason of the unwarranted act of the Highway Commissioner in paying over said

retained funds to the principal contractor without the knowledge and consent of said surety. International Steel and Iron Company and National Surety Company both applied for writ of certiorari to the Supreme Court of Tennessee by proper petition, and such writ was granted to both parties, and the Supreme Court of Tennessee assumed entire jurisdiction of the cause.

National Surety Company assigned errors in the Supreme Court of Tennessee to the holding of the Court of Appeals to the effect that said Chapter 80 of the 1929 Public Acts of Tennessee was not retroactive and was merely prospective and therefore did not apply to the instant case, and International Steel and Iron Company, in opposition to such assignments, insisted that if said statute was given a retroactive effect and was construed to provide for a release of the general contract surety, such act would then be unconstitutional and void as respects appellant's rights in the present case, in that it would violate Section 10, Article 1, of the Constitution of the United States because it would impair the obligation of appellant's pre-existing contract and destroy the substantial remedies enforceable by law at the time said contract was made.

The Supreme Court of Tennessee in its final opinion and decree, dated April 6th, 1935, for the first time in this litigation, construed said Chapter 80 of the 1929 Public Acts of Tennessee as releasing the general contract surety upon the payment of the retained funds to the general contractor, and his executing a refunding bond in accordance with the requirements of said statute, and further held that said statute was retroactive and applicable to the pre-existing contract between appellant and National Construction Company at the time said contract was made.

The rights and obligations of the respective parties, at the time the contract was made on March 22, 1928, were governed by the provisions of Chapter 74 of the 1917 Public

Acts of Tennessee, under which National Surety Company was especially and expressly obligated by contract for the full payment for all materials purchased and for all labor employed in the construction of the bridge. Under said statute the Commissioner of Highways was required to retain for appellant's express benefit ten per cent of all funds due the general contractor, and was required to hold said funds for appellant's benefit in the event of litigation. The effect of Chapter 80 of the 1929 Public Acts of Tennessee, as construed by the Supreme Court of Tennessee in this cause, was to destroy and release the foregoing obligation of National Surety Company to pay appellant for its materials and labor and also to destroy and impair the existing rights of appellant in and to the retained funds which were amply sufficient in this cause to satisfy said claim.

The Supreme Court of Tennessee in its said final opinion dismissed appellant's suit against National Surety Company, appellee, by applying the provisions of said Chapter 80 of the 1929 Public Acts of Tennessee, notwithstanding its passage after the contract rights of the parties were fixed under pre-existing statutes. This was a final judgment of the highest court of Tennessee, and from that judgment appellant has seasonably perfected its appeal to the Supreme Court of the United States.

A.

Federal Statutes Sustaining Jurisdiction.

The judgment sought to be reversed is a final one by the highest court in Tennessee, in which said court expressly held a State statute to be consistent with the Federal Constitution. This act of the Supreme Court was done unexpectedly at the end of the proceeding when appellant no longer had any right to add to the record.

Jurisdiction of the Supreme Court of the United States to review this cause is provided for by Section 237(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 344). The following cases seem clearly to support the claim of jurisdiction:

Home Building & Loan Association v. *Blaisdell,* 290 U. S. 398.

Western & Atlantic Railroad v. *Henderson,* 279 U. S. 639.

Nashville, Chattanooga & St. Louis Railway v. *White,* 278 U. S. 456.

Saunders v. *Shaw,* 244 U. S. 317.

If for any reason appeal should not be considered the appropriate procedure, then appellant respectfully requests that its appeal be considered as an application for a writ of certiorari, as authorized by paragraph (c) of said Section 237 of the Judicial Code (28 U. S. C. A., Section 344).

B.

Tennessee Statutes, the Validity of Which is Here Involved.

The only question in this cause is the validity of Chapter 80 of the 1929 Public Acts of Tennessee, as construed and applied to appellant in this cause by the Supreme Court of Tennessee. Said Act is an amendment to Chapter 74 of the 1917 Public Acts of Tennessee, and in order to comprehend the change effected by the Act in question, it will be necessary to first set out the pertinent provisions of said Act of 1917. Chapter 74 of the 1917 Public Acts of Tennessee is a general act providing for revenue in road building and provides a detailed method for the letting of contracts for the construction of highways and bridges upon sealed bids, and the making of contracts between the successful bidder and the State of Tennessee. It was in full force and effect

in Tennessee at the time the contract for the construction of the bridge was entered into between the State of Tennessee and National Construction Company on March 12, 1928, and also on March 22, 1928, at the time appellant entered into its contract with National Construction Company to furnish the labor and materials involved in this controversy.

Section 6 of said Chapter 74 of the 1917 Public Acts of Tennessee provides:

> "All contractors with whom contracts are made by the Department shall enter into good and solvent surety bond in an amount fixed by the Department, conditioned upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work. This bond must be approved by the Department and filed with its records. The contract shall provide that the work executed thereunder shall be subject to the inspection, approval, and acceptance of the State Highway Engineer or his assistant engineer acting on oath and under bond. Not more than ninety per cent of the contract price shall be paid on any contract until it is completed and the work is accepted. Before final acceptance, the contractor must furnish evidence to satisfy the Department that all the material used by him, his sub-contractors, or his agents, have been fully paid. When this is done, full settlement may be made with the contractor; but not until thirty days notice in some newspaper published in the county where the work is done, if there be a newspaper published there, and if not, in a newspaper in an adjoining county, that settlement is about to the made and notify all claimants to file notice of their claim with the Secretary of the Department. *The Secretary of the Department shall withhold a sufficient sum from the contract price due to pay all claims, including advertising, of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their*

claims against the contractor or his agent, in some court of competent jurisdiction."

Chapter 80 of the 1929 Public Acts of Tennessee was passed by the General Assembly of Tennessee on April 10, 1929, and became effective on April 11, 1929, when it was approved by the Governor. Said Act struck out of the previous law that portion which is in italics and substituted in lieu thereof the following provisions:

"The Secretary of the Department (now the Commissioner of Highways and Public Works) shall withhold a sufficient sum from the contract price due to pay all claims, of which notice is filed with him, for a period of sixty days from the date of the last advertising, to allow claimants to sue and prove their claims against the contractor or his agent, in some court of competent jurisdiction. In the event suit is brought against the contractor within the said sixty days from the date of the last advertising, by any claimant, the Department or its officer shall pay the amount of said claim into court. But in all cases where suits are not brought within the said period of sixty days the Secretary shall pay said sum or sums so withheld to the contractor.

"On the date set for full and final settlement with the contractor, the contractor may make proper refunding bond to the State of Tennessee for the amount of any sum or sums so held for the said period of sixty days, such bond to be approved by the Commission, whereupon the Commissioner or the Department of Highways and Public Works shall pay such contractor in full.

"All suits against contractors brought by any claimant shall make the Commissioner of Highways and Public Works a defendant thereto and, except where the same be for sums within the jurisdiction of a Justice of the Peace, shall be brought in the county where the main office of the Department of Highways and Public Works is situated. On any such suit being brought the sums then withheld may be paid into court,

as above provided, by simple petition of the Commissioner which may be substantially as follows:

"'Your petitioner, the Commissioner of Highways and Public Works, respectfully represents that under Chapter 74 of the Public Acts of 1917, and acts amendatory thereof, he has retained from (here insert name of contractor) on final estimate or settlement, $——, equal in amount to the claim of (here insert name of claimant), as the same was filed and presented to the Department of Highways and Public Works, a copy or photostatic copy of which is hereto attached, and, therefore, as authorized by law to do, suit having been brought by the claimant, your petitioner pays said sum to the Clerk of the court, by voucher or warrant No.—— dated ———, payable to the order of said Clerk for $——, drawn against the funds of said Department of Highways and Public Works, accompanying this petition, and your petitioner prays that the cause be dismissed as to him, this payment being in the nature of and for the purpose of an interpleader.'

"Such petition shall be signed by the Commissioner or the attorney for the Department of Highways and Public Works for him, and upon the filing of such petition accompanied by such payment the suit shall be dismissed as to the Commissioner as a matter of right, such sum so paid into court, as to the plaintiff or claimant, standing in lieu and as a satisfaction of the contractor's bond and a fulfillment of the duties of the Department of Highways and Public Works to the claimant or plaintiff."

C.

Date of Judgment Sought to be Reviewed and the Date Upon Which Application for Appeal was Presented.

The final judgment in the Supreme Court of Tennessee, which appellant seeks to have reviewed in this cause, was entered April 6, 1935. The application for appeal to the

United States Supreme Court was presented to the Chief Justice of the Supreme Court of Tennessee and allowed on June 10, 1935.

D.

Nature of the Case and Rulings of the Court Below.

Under the Tennessee Statutes in force on March 22, 1928, at the time appellant entered into its contract with National Construction Company, the appellee, National Surety Company, had become surety for the general contractor and had executed its bond in an amount fixed by the Highway Department, conditioned upon the full and faithful performance of every part and stipulation of the contract between National Construction Company and the State of Tennessee, and especially the payment for all materials purchased and all labor employed in the contemplated work. Said National Surety Company became directly obligated under its contract to appellant and guaranteed to it the full payment for all materials purchased and labor employed in the work under the contract between appellant and National Construction Company.

Also under said existing statute the Highway Department was required, upon completion of the work and the filing of claims, to withhold from the contractor a sufficient sum to pay all claims for labor and materials, and upon suit being filed within a reasonable time such funds would be subjected to the satisfaction of such claims.

Chapter 80 of the 1929 Public Acts of Tennessee, as construed by the Supreme Court of Tennessee in this case, altered and amended said existing statute in two material respects:

(a) It permitted the funds retained by the Highway Commissioner for the satisfaction of claims for labor and

materials to be paid over to the general contractor without the consent of claimants, and thereby impaired and destroyed such claimants' rights in and to said fund, and its right to have said fund subjected to the satisfaction of the claim.

(b) It released and discharged the general surety on the contractor's bond where the retained funds were paid over to the general contractor upon his executing a refunding bond without the consent of the claimant and thereby destroyed the obligation of the contract previously existing between the contract surety and appellant, on the strength of which contract appellant furnished the labor and materials to the general contractor.

It is submitted that the foregoing ruling of the Supreme Court of Tennessee, in holding that said Chapter 80 of the 1929 Public Acts of Tennessee was retroactive and applicable to appellant's rights and sufficient to deprive appellant of the obligation of its pre-existing contract with National Surety Company and all its right to enforce satisfaction of its claim against the retained funds held by the Highway Commissioner, was such as to bring the case within the jurisdictional provision herein relied on, and the following cases are believed to sustain the jurisdiction of this Court:

Sturgis v. *Crowninshield,* 4 Wheat. pp. 197, 198.
Ogden v. *Saunders,* 12 Wheat. 213.
State of Louisiana v. *Police Jury, etc.,* 111 U. S. 716.
Worthen v. *Thomas,* 292 U. S. pp. 431.
Worthen v. *Kavanaugh* (decided April 1, 1935, No. 556, October Term, 1934).
Home Building & Loan Association v. *Blaisdell,* 290 U. S. 398.
Western & Atlantic Railroad v. *Henderson,* 279 U. S. 639.

Nashville, Chattanooga & St. Louis Railway v. *White*, 278 U. S. 456.
Saunders v. *Shaw*, 244 U. S. 317.

Copy of this statement has been served upon adversary counsel in the manner provided by the rules of the United States Supreme Court.

Respectfully submitted,

F. M. Bass,
Louis Leftwich,
Cecil Sims,
Counsel for Appellant.

June 10, 1935.

(6649-C)